UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 38

Docket No. PH-1221-10-0219-W-1

Valerie A. Peterson,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 18, 2011

Richard Ruth, Esquire, Erie, Pennsylvania, for the appellant.

George A. Figurski, Esquire, Pittsburgh, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant filed a petition for review of the initial decision that dismissed her individual right of action (IRA) appeal for failure to state a claim upon which relief can be granted. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a Staff Nurse with the Veterans Affairs Medical Center (VAMC) in Erie, Pennsylvania. Initial Appeal File (IAF), Tab 9, subtab 4h. She

filed complaints with the Office of Special Counsel (OSC) on September 15, October 9, and December 12 and 25, 2007, alleging reprisal for disclosing numerous patient care concerns. IAF, Tab 13, subtab 3 at 17, 19, 24, 26-27, subtab 4 at 33-34, 36-38, subtab 5 at 41-42, subtab 6 at 44, 46-48, subtab 7. On November 6, 2009, OSC issued a preliminary determination letter which informed the appellant that there was insufficient evidence to support that the agency gave her a lower performance evaluation, denied her the opportunity to serve on committees, reduced her work hours, denied her a within-grade step increase, and denied her a promotion from a RN I to a RN II position, in violation of 5 U.S.C. § 2302. *Id.*, subtab 8 at 66-67. On November 23, 2009, OSC closed its investigation and advised the appellant of her right to seek corrective action from the Board.[1] *Id.*, subtab 9A.

¶3 The appellant timely filed a Board appeal seeking corrective action under the Whistleblower Protection Act (WPA) and an award of consequential damages, alleging that the agency failed to "award/promote" her and denied her a within-grade increase in reprisal for making numerous disclosures between March 2006 and August 2007, to Chief Nurse Executive Donald Wetzel, Director Michael Adelman, M.D., and Chief Medical Director Anthony Behm, M.D., about improper patient care and procedures. IAF, Tab 1 at 3-11, Tab 13, subtabs 3-7. She requested a hearing. IAF, Tab 1 at 2. The agency filed a motion to dismiss. IAF, Tab 5. The administrative judge granted a joint motion to extend the discovery deadline to March 26, 2010. IAF, Tab 12. However, at the March 22, 2010 telephonic conference, the administrative judge decided to hold the hearing

[1] In its November 6, 2009 letter, OSC stated that it found evidence that the agency may have denied the appellant the opportunity to have her part-time hours increased in retaliation for protected whistleblowing. IAF, Tab 13, subtab 8 at 66-67. OSC noted that the appellant sought a remedy that included pain and suffering, and stress-related damages, which went beyond what OSC considered full corrective action, and therefore OSC did not anticipate further pursuing the matter. *Id.*

in abeyance pending his resolution of the jurisdictional issue and closed the record on the jurisdictional issue. IAF, Tab 16.

¶4 Without holding the requested hearing, the administrative judge issued an initial decision that dismissed the appeal for failure to state a claim upon which relief can be granted. Initial Decision (ID) at 1, 5. He found that the appellant's "vague and generalized statements" of alleged improper patient care lack specificity and "appear to be based upon mere speculation or conjecture," and therefore do not constitute protected disclosures. ID at 4. The administrative judge thereby concluded that the appellant failed to prove by preponderant evidence that she engaged in whistleblowing activity by making protected disclosures under 5 U.S.C. § 2302(b)(8). ID at 4-5.

¶5 The appellant filed a petition for review of this decision, alleging that she submitted evidence of specific protected disclosures. Petition for Review (PFR) File, Tab 1 at 4-5. To the extent that the administrative judge deemed this evidence insufficient, the appellant argues that the administrative judge closed the record prior to the close of discovery, which not only denied her the opportunity to complete discovery on the jurisdictional issue, but also precluded her from rebutting the agency's arguments in its motion to dismiss prior to the administrative judge's determination of the jurisdictional issue. PFR File, Tab 1 at 5-21; *see* IAF, Tab 16. The agency responded in opposition. PFR File, Tab 3.

ANALYSIS

The administrative judge improperly dismissed this appeal for failure to state a claim.

¶6 On appeal below, the administrative judge found that the appellant failed to establish jurisdiction over her IRA appeal. *See* ID at 3-5. However, he dismissed the appeal on the ground that "the appellant has failed to state a claim of [sic] upon which relief can be granted." ID at 5. A dismissal for failure to state a claim was not the proper disposition for several reasons. First, whether the

appellant stated a claim upon which relief can be granted goes to the merits of her case, and the Board cannot assume for purposes of analysis that all jurisdictional requirements have been met and resolve a case on the merits. *White v. U.S. Postal Service*, 114 M.S.P.R. 574, ¶ 11 (2010). The Board must determine whether it has jurisdiction over the appeal prior to proceeding to the merits. *Schmittling v. Department of the Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000). Thus, the administrative judge's determination that the appellant failed to establish Board jurisdiction over her appeal is at odds with his dismissal of the appeal on the merits. *See* ID at 3-5.

¶7 Second, it was inappropriate for the administrative judge to dismiss the appeal for failure to state a claim when he relied upon his review of the appellant's evidentiary submissions and concluded, "I find that it is unclear from the record, if any, protected disclosures the appellant may have made." ID at 4. Dismissal for failure to state a claim upon which relief can be granted is based solely on the appellant's allegations, to the exclusion of any record evidence. *White*, 114 M.S.P.R. 574, ¶ 11; *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 8 (2008). Disposing of a claim in favor of a defending party, without an evidentiary hearing, and based on matters beyond the claimant's allegations is summary judgment, not dismissal for failing to state a claim upon which relief can be granted. *Haasz*, 108 M.S.P.R. 349, ¶ 8. Based on the foregoing, we find that the administrative judge erred in dismissing this appeal for failure to state a claim upon which relief can be granted. *See id.*

The administrative judge analyzed the jurisdictional issue under an invalid legal standard.

¶8 It is well-established that the Board has jurisdiction over an IRA appeal if the appellant exhausted her administrative remedies before OSC and makes nonfrivolous allegations that: (1) she engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v.*

Department of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002). To meet the nonfrivolous standard, an appellant need only plead allegations of fact which, if proven, could show that she made a protected disclosure that was a contributing factor in the agency's decision to take or fail to take a personnel action. *See Massie v. Department of Transportation*, 114 M.S.P.R. 155, ¶ 11 (2010). In cases involving multiple alleged protected disclosures and multiple alleged personnel actions, where an appellant makes a nonfrivolous allegation that at least one alleged personnel action was taken in reprisal for at least one alleged protected disclosure, she establishes Board jurisdiction over her IRA appeal. *Groseclose v. Department of the Navy*, 111 M.S.P.R. 194, ¶ 15 (2009). Whether an allegation is nonfrivolous is determined on the basis of the written record. *Id.* If the appellant satisfies each of these jurisdictional requirements, she has the right to a hearing on the merits. *Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 10 (2009).

¶9 Although the administrative judge recognized that the Board adopted the jurisdictional standard under *Yunus*, he chose instead to apply the standard under *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994), *overruled by Rusin*, 92 M.S.P.R. 298, which requires the appellant to prove each jurisdictional criterion by preponderant evidence.[2] *See* ID at 2-4 (citing *White v. Department of the Air Force*, 63 M.S.P.R. 90, 94 (1994)). The Board overruled *Geyer* in 2002, and since then has consistently held that the appellant need only make nonfrivolous allegations that she made a protected disclosure and that the disclosure was a contributing factor in the agency's decision to take or failure to take a personnel action, to establish Board jurisdiction over her IRA appeal. *See Rusin*, 92 M.S.P.R. 298, ¶¶ 8-12. As the administrative judge improperly

[2] We note that the administrative judge cited the correct jurisdictional standard in the IRA jurisdictional order. *See* IAF, Tab 6 at 2.

heightened the appellant's burden of proof and erroneously analyzed the jurisdictional issue under an invalid legal standard, we VACATE the initial decision in its entirety.

The appellant has established jurisdiction over her IRA appeal.

1. Exhaustion of OSC administrative remedies

¶10 The undisputed record shows that the appellant filed four OSC complaints, alleging, among other things, that the agency denied her a within-grade increase, a promotion, and an opportunity to increase her hours from a .10 FTE position to a .25 FTE position, in reprisal for making numerous disclosures to Mr. Wetzel, Dr. Adelman, Dr. Behm and others concerning improper patient care.[3] IAF, Tab 13, subtabs 3-7. The appellant raises these same claims before the Board. *See* IAF, Tab 1 at 7-11, Tab 13, subtab 9. On November 23, 2009, OSC closed its investigation into the appellant's claims. *See* IAF, Tab 13, subtabs 3-6, 8, 9A. Thus, we find the appellant proved that she exhausted her administrative remedies before OSC. *See Kukoyi*, 111 M.S.P.R. 404, ¶ 12.

2. Protected disclosures under 5 U.S.C. § 2302(b)(8)

¶11 Protected whistleblowing takes place when an appellant makes a disclosure that she reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A). The appellant need not prove that the condition disclosed

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[3] In addition to her OSC complaints, the appellant submitted a detailed chronology setting forth the dates she made the disclosures, the exact nature of the disclosures, the persons to whom she made the disclosures, and the alleged personnel actions that the agency took or failed to take in reprisal for making these alleged protected disclosures. IAF, Tab 13, subtab 7. Although the record does not contain a transmittal letter, OSC's determination letter reflects that OSC considered the alleged personnel actions, i.e., a reduction of work hours and denial of the opportunity to serve on an Emergency Management Task Force, which are set forth in the chronology, but are not mentioned in the OSC complaints. *Id.*, subtab 7 at 52, 60; *see id.*, subtabs 3-6.

actually established a violation of law, rule, or regulation, gross mismanagement of funds, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See Horton v. Department of Veterans Affairs*, 106 M.S.P.R. 234, ¶ 15 (2007). The test for determining whether the appellant had a reasonable belief that her disclosure was protected is whether a disinterested observer with knowledge of the essential facts, known to and readily ascertainable by the appellant, could reasonably conclude that the actions of the government evidence one of the categories of wrongdoing noted above. *Id.* To determine whether a disclosed danger to public health or safety is sufficiently substantial and specific to warrant protection under the WPA, the U.S. Court of Appeals for the Federal Circuit has considered the likelihood and imminence of the alleged harm resulting from the danger. *Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008).

¶12 Here, the appellant alleged that over the course of a year and a half, she made numerous disclosures concerning patient neglect and mistreatment and improper physician-ordered care and procedures in violation of the Medical Center Memorandum. *See* IAF, Tab 1 at 7-11, Tab 13, subtab 3 at 17, 19, 26-27, subtab 4 at 33-34, 36-38, subtab 6 at 46-48, subtab 7 at 52-55, 52-62, subtab 9. For example, she claimed that on or about June 18, 2006, she informed Chief Nurse Executive Wetzel that nurses were ordered to admit critical care, post-operation patients to the sixth floor, where the nurses lacked the ability to monitor the patients' vital signs, oxygen flow and other bodily systems; under the Medical Center Memorandum, these patients should have been recovered in the Intensive Care Unit or the recovery room. *Id.*, subtab 7 at 51, 53-54. The appellant alleged that the ongoing improper patient care and procedures jeopardized and adversely affected the health and safety of patients and in some extreme cases led to strokes, heart attacks, and death of patients. *See id.*, subtab 3 at 17, subtab 4 at 34, subtab 6 at 47, subtab 7 at 51. Because there is no indication that reporting inadequate patient care was one of the appellant's duties

as a Staff Nurse, the appellant's disclosures could not be deemed unprotected on the ground that they were made as part of her normal duties through normal channels. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001). Based on the foregoing, we find that the appellant has nonfrivolously alleged that a disinterested observer in her position could reasonably conclude that the alleged improper patient care and procedures evidence a specific and imminent danger to the health and safety of the public, i.e., patients at VAMC. *See Chambers*, 515 F.3d at 1369; *Horton*, 106 M.S.P.R. 234, ¶ 15; *Tatsch v. Department of the Army*, 100 M.S.P.R. 460, ¶¶ 11-13 (2005) (disclosure of two incidents involving triage of on-scene late term, unstable pregnant females in labor who were advised to "seek care at SMC" without the benefit of stabilization or monitoring via ambulance, one of which resulted in a disastrous outcome); *Poster v. Department of Veterans Affairs*, 92 M.S.P.R. 501, ¶¶ 3, 8 (2002) (disclosure of patients receiving inadequate and substandard medical care, and practices in violation of established policies), *aff'd*, 71 F. App'x 851 (Fed. Cir. 2003). Thus, we find that the appellant made a nonfrivolous allegation that she made at least one protected disclosure under 5 U.S.C. § 2302(b)(8).[4]

3. Personnel Actions

¶13 With respect to the agency's "failures to award/promote," the appellant contends that the agency did not select her for the .25 FTE position for which she applied in August 2007, and/or that the agency denied her the opportunity to "further advance [her] hours." *See* IAF, Tab 1 at 3, Tab 13, subtab 3 at 17, 19, subtab 4 at 34, 36, subtab 6 at 46-47. Regardless of whether we deem this as an

[4] In light of this finding, we need not consider whether the agency's Medical Center Memorandum could be a considered a "rule" within the meaning of § 2302(b)(8)(A) and whether the appellant nonfrivolously alleged that she disclosed a violation of rule. *See Rusin*, 92 M.S.P.R. 298, ¶¶ 15-17.

allegation by the appellant that the agency denied her the opportunity to increase her hours and/or denied her a promotion, the appellant has nonfrivolously alleged that the agency took or failed to take a personnel action, i.e. a "decision concerning pay," under 5 U.S.C. § 2302(a)(2)(A) and 5 C.F.R. § 1209.4(a)(9). *See generally Gonzales v. Department of the Navy*, 99 M.S.P.R. 97, ¶ 13 (2005) (denial of the opportunity to earn overtime is a "decision concerning pay" covered under 5 U.S.C. § 2302(a)(2)(A)).

¶14 The appellant has also nonfrivolously alleged that the agency denied her a within-grade increase in reprisal for making protected disclosures, claiming that sometime between September 30 and October 16, 2007, Human Resources informed her that she would receive a step increase, but that it was never effected. *See* IAF, Tab 1 at 3, Tab 13, subtab 7 at 63. The record reflects that the agency effected a within-grade increase on April 1, 2007. IAF, Tab 9, subtab 4h. Although there is no other record evidence to support that the appellant was entitled to and did not receive a within-grade increase on or after September 30, 2007, this is mere factual contradiction that the Board may not weigh in order to make its jurisdictional determination. *Simone v. Department of the Treasury*, 105 M.S.P.R. 120, ¶ 8(2007). This factual dispute is properly resolved after a hearing on the merits. *Id*.

4. Contributing factor

¶15 In order to satisfy the contributing factor criterion, an appellant need only raise a nonfrivolous allegation that the fact of or content of the protected disclosure was one factor that tended to affect the personnel action in any way. *Kukoyi*, 111 M.S.P.R. 404, ¶ 11. In an amendment to the WPA, Congress established a knowledge-timing test that allows an employee to demonstrate that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure

was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Kukoyi*, 111 M.S.P.R. 404, ¶ 11. Once an appellant has made a nonfrivolous allegation that the knowledge-timing test has been met, she has established the second element of a jurisdictional showing under *Yunus* and *Rusin*. *Wood v. Department of Defense*, 100 M.S.P.R. 133, ¶ 13 (2005).

¶16 As set forth above, the appellant alleged that on June 18, 2006, and other occasions between March 2006 and August 2007, she directly disclosed instances of improper patient care to Mr. Wetzel. *See* IAF, Tab 13, subtabs 3-7. She contended that in August 2007, she applied for a .25 FTE position, to which she heard no response. *See id.*, subtab 3 at 17, 19, subtab 4 at 34, subtab 6 at 47, subtab 7 at 52. The appellant alleged that when she telephoned Mr. Wetzel's secretary about the .25 FTE position, she overheard Mr. Wetzel telling his secretary to inform the appellant that she applied late for the position and that she could re-apply once the agency re-posted the position. *Id.*, subtab 4 at 34. The appellant further alleged that she raised the issue to her supervisor, Sue Landon; when Ms. Landon spoke with Doreen Sommers, the Assistant Chief of Nursing Executive, and Arlene Romba of Human Resources, Ms. Landon learned that Mr. Wetzel would not approve the appellant for the position, despite the appellant's seniority, experience and solid performance evaluations, and "to hang on as [Mr.] Wetzel would be retiring soon." *Id.*, subtab 3 at 17, 19, subtab 4 at 34, subtab 6 at 47, subtab 7 at 52. Thus, the appellant has nonfrivolously alleged that Mr. Wetzel had knowledge of her disclosures and played an integral part in the agency's alleged decision on or about August 2007, not to promote and/or not to increase the appellant's hours to a .25 FTE position. The Board has held that a personnel action taken within approximately 1 to 2 years of the appellant's disclosures satisfies the knowledge-timing test. *See Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 22 (2010). Based on the foregoing, we find that the appellant has nonfrivolously alleged that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure

was a contributing factor in the personnel action. *See Kukoyi*, 111 M.S.P.R. 404, ¶ 11.

¶17 Accordingly, we find that the appellant has established Board jurisdiction over her IRA appeal. Thus, the appellant is entitled to hearing on the merits. *See Rusin*, 92 M.S.P.R. 298, ¶ 20. In reviewing the merits of an IRA appeal, the Board must examine whether the appellant has proven by preponderant evidence that she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and that such whistleblowing activity was a contributing factor in an agency personnel action; if so, the Board must order corrective action unless the agency establishes by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *Schnell*, 114 M.S.P.R. 83, ¶ 18.

ORDER

¶18 For the foregoing reasons, we REMAND this IRA appeal to the Northeastern Regional Office for a hearing and adjudication on the merits of the appeal. Prior to holding a hearing, the administrative judge shall afford the parties a reasonable opportunity to complete discovery, and order the parties to submit any other evidence that he deems necessary to adjudicate the merits of this appeal. Consistent with this Opinion and Order, the administrative judge shall hold a hearing and issue a new initial decision that makes findings on whether the appellant is entitled to corrective action under the WPA.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.